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Court of Appeals
Division II
State of Washington
9/30/2020 12:25 PM

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

MAKAH INDIAN TRIBE,

Plaintiff/Appellant,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ (in her
official capacity), WASHINGTON STATE DEPARTMENT OF
NATURAL RESOURCES, and the WASHINGTON STATE BOARD OF
NATURAL RESOURCES

Defendant/Appellee

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

**RESPONSE OF THE MAKAH TRIBE TO THE AMICUS CURIAE
BRIEF OF THE HOH TRIBE, QUILEUTE TRIBE, AND
QUINAULT INDIAN NATION**

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I. INTRODUCTION

In their amicus curiae brief, the Hoh Tribe, Quileute Tribe, and Quinault Indian Nation (hereinafter “QTA tribes”) attempt to characterize this case as an adjudication of treaty hunting rights on the northwest corner of the Olympic Peninsula and argue that as such it must be dismissed because the tribes are necessary parties that cannot be joined due to sovereign immunity. The problem with their argument is that the case is a straightforward procedural challenge to actions of the Department of Natural Resources (“DNR”) and the Board of Natural Resources (“Board”) and does not require the Court to make any findings about – let alone resolve – a longstanding dispute over the exercise of treaty hunting rights in that area. Properly viewed as a challenge by the Makah Tribe to agency actions under the State Environmental Policy Act (“SEPA”) and Public Lands Act and a request for the issuance of a constitutional writ of certiorari, the Court has jurisdiction to resolve the important question at the heart of this case – whether the transfer of public lands designated for public use and actually used by the public to private ownership is exempt from SEPA.

To be clear, the Makah Tribe’s position is that it retains treaty hunting rights in the area south of the Makah Reservation where two of the parcels in the Peninsula Land Exchange (“Exchange”) are located and that the Exchange threatens to diminish Tribal members’ ability to exercise those rights. Further, there is clear evidence that these rights have been recognized by the

Washington Department of Fish and Wildlife (“WDFW”) and DNR. However, the Court need not make any finding on the disputed treaty issues to resolve Makah’s claims in this case. Rather, the relevant material facts are that Makah members utilize the DNR land proposed for transfer to private ownership for hunting and other subsistence and cultural activities (both based on their status as members of the public and Tribal members), the Makah Tribe opens the land to hunting, and access by Tribal members is likely to be diminished if the exchange is completed. These facts are undisputed and are sufficient to establish standing for the Court to hear Makah’s claims under SEPA.

Because Court resolution of these claims on the merits would not affect the QTA tribes’ treaty rights, will result in adequate relief for the parties, does not risk subjecting DNR and the Board to conflicting judgments, and will not prejudice the absent tribes, the QTA tribes’ request to dismiss the case under Rule 19 should be denied. It is possible and appropriate to fashion adequate relief without adjudicating any treaty rights. Likewise, the requirements for dismissal under the Uniform Declaratory Judgment Act (“UDJA”) are not satisfied because the QTA tribes’ interest in their treaty rights will not be prejudiced or affected in any way.

II. RELEVANT FACTUAL BACKGROUND

The Makah Tribe initiated this litigation to challenge serious procedural flaws in the DNR and Board’s actions approving the Exchange,

and the Tribe's claims reflect the nature of its administrative challenge. First, the Tribe alleged that the Board "violate[d] SEPA because the DNR improperly and unlawfully applied a categorical exemption pursuant to WAC 197-11-800(5)." CP at 23 (Compl. at 20). Second, the Tribe alleged that the Board "violate[d] the Public Lands Act, RCW 79.17.010(5), because the [DNR] failed to 'identify and address cultural resource issues' as required." CP at 23-24 (Compl. at 20-21). Finally, based in part on the procedural violations of SEPA and the Public Lands Act alleged in its first two claims, Makah sought issuance of a constitutional writ of certiorari. CP at 24 (Compl. at 21). The Tribe sought relief appropriate to the procedural violations, namely an order granting the writ (and requiring defendants to prepare an administrative record), a declaration that the agency action violated SEPA and the Public Lands Act, and an order invalidating approval of the Exchange and remanding it for reconsideration. CP at 25 (Compl. at 22). The Complaint does not seek a declaration of the Tribe's treaty rights, an injunction affecting other tribal treaty rights, or any other legal determination regarding treaty rights.

It is undisputed that the Makah Tribe opens the area in question (east of Lake Ozette where parcels S-CL09 and S-CL10 are located) to hunting by members of the Tribe and that Makah hunters access and utilize the DNR property proposed for the Exchange for purposes of hunting and other subsistence and cultural activities. CP 124 (Greene Decl. ¶ 5); CP 137-38,

147, 170 (DePoe Decl. ¶¶ 3-6, Ex. A at 5, 28; CP 296 (Second DePoe Decl. ¶ 11). Further, it is undisputed that the transfer of the DNR parcels from public to private ownership will adversely affect the access by Makah members. CP 124 (Greene Decl. ¶ 7); CP 139 (DePoe Decl. ¶¶ 9-10).

Although not essential to establish the Tribe's standing for its SEPA claim, Makah disagrees with the QTA tribes' characterization of Makah hunting rights in the disputed area as an "unfounded assertion" or that WDFW and Makah have no agreement with respect to the area available for Makah treaty hunting. Amicus Br. at 7-9. Makah Councilmember Patrick DePoe explained in his second declaration that:

In 2008, the Tribe presented information to [WDFW] regarding treaty time use of areas outside of Makah's ceded territory for hunting. That process, which included other tribes on the Olympic Peninsula, resulted in an informal agreement between the Tribe and WDFW.

CP 296 (Second DePoe Decl. ¶ 11). The QTA tribes omitted this evidence that WDFW has recognized Makah treaty hunting rights in the area in question. Further, WDFW's draft Procedural Guidelines also reference Makah's 2008 process and the agency's oral communication acknowledging Makah hunting areas outside the Tribe's ceded territory:

In early 2008, the Makah Tribe provided WDFW and the Clallam County prosecutor's office evidence that they felt supported their position to open traditional hunting areas outside of the ceded area. WDFW requested that the tribe conduct an outreach effort to the other treaty tribes that the Makah's claimed traditional area would overlap and requested that the Makah Tribe meet with other treaty tribes. The Quileute Tribe requested a meeting with WDFW to present their review of the Makah Tribe's evidence. WDFW met with the Makah Tribe again to present a possible area that WDFW

would feel comfortable recognizing, based on the information that the tribe provided. The meeting was left that WDFW would develop a process to evaluate a tribe's claim and the WDFW discussed interim enforcement guidance for the 2008 hunting season.

Geyer Aff. Ex. C at 4; *see also id* Ex. C at 5 (WDFW's final review of tribal evidence of traditional areas in some instances "resulted in oral communication to the tribe concerning those areas where WDFW intends to use its discretion and not enforce state law against members of the tribe"). As a result of this process and the resulting informal agreement with WDFW, Makah continues to "open[] for hunting a portion of the Dickey GMU which contains the DNR parcels at issue near Lake Ozette." CP 296 (Second DePoe Decl. ¶ 11). During the Exchange process, DNR also recognized the Tribe's hunting rights in the affected area. CP 133 (Greene Decl. Ex. B at 1) (May 20, 2020, letter from Angus Brodie stating that "the Makah Tribe, along with other tribes from the Olympic Peninsula, have long-standing customary use rights to hunt and gather on these lands").

III. ARGUMENT

The Makah Tribe has standing to challenge the procedural flaws in defendants' approval of the Exchange because its hunters use the land in question and will be adversely affected by the transfer to private ownership – regardless of whether such hunting is based on treaty rights or is considered general public use of the land. A clear focus on the specific claims and relief sought by Makah demonstrate that the QTA tribes are not needed for a just adjudication and dismissal is not required by the inability to join them. Indeed,

dismissing the case would be antithetical to the public interest. Complete relief can be afforded to Makah without prejudice to the absent tribes because that relief will focus solely on DNR and the Board's compliance with SEPA and need not address issues of treaty rights adjudication. Likewise, for many of the same reasons, dismissal under the UDJA is not warranted.

A. The Makah Tribe Has Standing to Challenge DNR's SEPA Compliance and Seek Issuance of a Constitutional Writ of Certiorari.

In order to set up the argument that their treaty hunting rights are implicated by the case, necessitating its dismissal under CR 19, the QTA tribes focus on Makah's standing and assert that a predicate finding of Makah hunting rights in the disputed area is necessary to the relief Makah seeks. The QTA tribes are mistaken, and this error eliminates the foundation for their core argument under CR 19.

Under SEPA, an aggrieved party wishing to challenge agency action "must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protect by SEPA, and (2) the party must allege an injury in fact." *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App. 787, 799, 309 P.3d 734 (2013) (quoting *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000)). Here, Makah satisfies the basic standing test because it is undisputed that its members' access and use of the land to be exchanged will be adversely affected when it is transferred to private ownership.

First, the change in use of public land caused by the Exchange is well-within the zone of interests protected by SEPA. SEPA's procedural requirements promote the policy of fully informed decision making by government bodies when undertaking "major actions significantly affecting the quality of the environment." See *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674, 677 (1976) (citing RCW 43.21C.010; RCW 43.21C.030). Such actions are defined to include "transfer, or exchange natural resources, including publicly owned land." WAC 197-11-704(2)(a)(ii). Thus, SEPA is intended to improve decision-making for the type of land exchanges the Tribe challenges.

Second, Makah adequately alleges an injury in fact because the transfer to private ownership poses a reasonably likely threat to limit Tribal members' access to the property for a wide range of subsistence activities. When an alleged injury is threatened rather than existing, it must be "immediate, concrete, and specific." *Lands Council*, 176 Wn. App. at 800 (quoting *Harris v. Pierce County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996)). Makah satisfies this standard because its members' ability to continue these tremendously important activities is reasonably likely to be threatened by the completion of the Exchange. See, e.g., CP 5, 16 (Compl. ¶¶ 2, 50). These injuries are not speculative. Indeed, Makah Tribal Chairman T.J. Greene, Sr. has detailed how the private timber company set to receive

the lands has restricted his and other Tribal members' access from its other lands. CP 124.

Standing requirements for procedural injury, which are the sole injuries alleged in the present case, are further relaxed from the "basic test for standing" described above. *Lands Council*, 176 Wn. App. at 801-02 (quoting *Five Corners Family Farmers*, 173 Wn.2d 296, 303 (2011)). For a claim alleging violation of a procedural right like SEPA review, the Tribe need only "demonstrate a reasonable probability that the deprivation of the procedural right will threaten a concrete interest of the party's." *Id.* Here, the Tribe demonstrated that the agencies' failure to conduct any SEPA review on the exchange is reasonably probable to threaten its concrete interest in a fully informed agency decision regarding the Exchange.

In sum, while the standing requirement is satisfied by the Tribe's credible assertion of treaty hunting rights on the land to be exchanged, it is not the only basis for standing in this case. The facts demonstrating that the Tribe opens the area in question for hunting, its members meet their subsistence and cultural needs by hunting and gathering on the land to be transferred, and such use will be threatened by completion of the Exchange are undisputed and more than sufficient to establish standing, particularly under the less stringent test applicable to procedural violations. The Court need not make any "predicate findings" regarding Makah treaty rights (or any other treaty rights) to determine that it has jurisdiction over the case. Makah Tribal members, like

all other Washingtonians, have the right to access open public lands, and the Exchange threatens that right.

B. The Absent Tribes Are Not Needed for a Just Adjudication.

Where, as here, joinder of absent persons is not feasible due to tribal sovereign immunity, the application of CR 19 becomes a two-step analysis. *Auto United Trades Org. v. State* (“*AUTO*”), 175 Wn.2d 214, 221, 285 P.3d 52 (2012). First, under CR 19(a), the court “determines whether absent persons are ‘necessary’ for a just adjudication.” *Id.* at 221-22. If the absent persons are necessary but joinder is not feasible, “the court then considers whether, ‘in equity and good conscience,’ the action should still proceed without the absentees under CR 19(b).” *Id.* at 222. Washington courts may look to federal case law applying the substantially similar federal version of CR 19. *Id.* at 223. The inquiry under CR 19 is a “practical, fact-specific one, designed to avoid the harsh results of rigid application.” *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1186 (W.D. Wash. 2014) (quoting *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1154-55 (9th Cir. 2002)). As the Washington Supreme Court stated, “courts must carefully consider the circumstances of each case in balancing prejudice to the absentee’s interests against the plaintiff’s interest in adjudicating the dispute.” *AUTO*, 175 Wn.2d at 233.

1. The Absent Tribes Are Not Necessary Parties.

The QTA tribes assert that they are necessary parties under CR 19(a)(2) because the case will affect their treaty hunting rights. Amicus Br. at 13-14. However, this argument is built on a false construct because it relies on framing the case as an adjudication of Makah’s hunting rights. *See id.* at 13 (arguing that a judgment in the case could “purport[] to decide whether Makah has the right to deplete the treaty resources located in the Amici Tribes’ treaty territory”). According to the QTA tribes, this case is “similar” to the Skokomish Tribe’s effort to adjudicate its treaty hunting and gathering rights. *Id.* at 14. However, their comparison to a case that was dismissed on federal Rule 19 grounds is unavailing because there, Skokomish sought a full adjudication of the nature and extent of its treaty rights, including the geographic scope of the right, an allocation of one hundred percent of the treaty resources, and a declaration that it possessed exclusive regulatory and management authority over the exercise of the right, among other things. *Skokomish*, 994 F. Supp. 2d at 1187, 1189 (cataloging the “sweeping” requests for relief by the tribe under its treaty right).¹ This case is completely different. The Makah Tribe’s claims assert violations of administrative procedures required by state law, and the relief sought is invalidation of agency action and remand to the agency. Adjudication of these non-treaty claims does not

¹ The argument for dismissal under Rule 19 in *Skokomish* was particularly strong because the tribe failed to join three other tribes that were party to the treaty it was seeking to adjudicate. *Skokomish*, 994 F. Supp. 2d at 1186. Here, the Makah Tribe is not seeking to adjudicate its treaty right, and, further, its assertion of treaty hunting rights is under the Treaty of Neah Bay, to which it is the only tribal party.

require, as a prerequisite, a judicial determination of the relative treaty rights of Makah and the QTA tribes because, as discussed above, the Court can find the Tribe has standing without relying on the treaty right. Accordingly, a judgment on Makah's SEPA claims and request for a writ would not have a practical, legal, or any other effect on the absent tribes. *See Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034, 1043 (9th Cir. 2008) (joinder not necessary because "this litigation is not aimed at the tribes and their gaming").

The QTA tribes are also not necessary to this case because there is no risk of multiple, inconsistent obligations if the Court grants the relief sought by Makah. *See* CR 19(a)(2)(B). The judgment in this case will relate solely to DNR and the Board's compliance with procedural obligations under state law relative to a single agency action – approval of the Exchange. The QTA tribes do not assert they would seek a different outcome on that narrow issue presented in the case, nor would they have any reason to do so. *See* Amicus Br. at 4 (taking no position on "the other positions contested by" Makah and the defendants). Rather, their only interest appears to be to attempt to turn the case into something it is not (an adjudication of treaty rights) and obtain its dismissal based on a negative finding about the Makah Tribe's treaty rights in the disputed area, the very issue that they claim should prevent the case from going forward.

While *Skokomish* was an attempt to fully adjudicate the tribe’s treaty hunting rights and could not have been more different from the present action, *Makah v. Verity*, 910 F.3d 555 (9th Cir. 1990) is directly on point with the core issue here – whether the QTA tribes are necessary to “the Makah’s procedural claims for . . . prospective injunctive relief.” In *Makah*, the Tribe challenged federal regulations allocating salmon harvest in two types of claims: 1) a substantive claim asserting that the federal quotas violated treaty rights and requesting an injunction establishing a higher quota; and 2) a procedural claim asserting the regulations violated applicable law governing the administrative process. *Id.* at 557. The appeals court affirmed dismissal of the substantive claims under Rule 19, but reversed the district court’s dismissal of the procedural claims. *Id.* at 558-59. As to the latter, the court held that “[t]o the extent that the Makah seek relief that would affect only the future conduct of the administrative process, the [procedural claims] are reasonably susceptible to adjudication without the presence of other tribes.” *Id.* at 559. Here too, Makah seeks declaratory relief applicable solely to the agency action under review – approval of the Exchange – and a remand for reconsideration of the Exchange in compliance with SEPA. Unlike the dismissed claims in *Makah*, no relief is sought that would affect the allocation of treaty resources or other substantive aspects of treaty rights. Indeed, one would think that the QTA tribes would share Makah’s desire for DNR and the

Board to fully evaluate the exchange under SEPA. *See id.* (absent tribes not prejudiced because they have an “equal interest in an administrative process that is lawful”).² If the Court rules for Makah, and the Exchange is subject to SEPA review, the QTA tribes will have a full opportunity to express their interests through consultation and the SEPA process.

2. The Absent Tribes Are Not Indispensable Parties.

Even if the Court were to find that the QTA tribes are necessary parties, consideration of the four factors under CR 19(b) in determining whether “in equity and good conscience the action should proceed” supports rejection of the QTA tribes’ request to dismiss the case.

First, a judgment in their absence would not be prejudicial because it would be a narrow procedural ruling on whether state agencies complied with mandatory processes under state law. The QTA tribes’ entire claim to prejudice requires transmogrification of the case into the broad treaty rights adjudication in *Skokomish*. As we explain above, the cases could not be more

² While *Makah* is on all points with the posture of the current case and demonstrates that the QTA tribes are not necessary parties, it would also be appropriate for Makah’s challenge to the Exchange to proceed under the “‘public rights’ exception to traditional joinder rules.” *Makah*, 910 F.3d at 559 n.6 (citing *Conner v. Burford*, 848 F.2d 1441, 1459-61 (9th Cir. 1988)). DNR and the Board have a duty to follow procedures required by SEPA, and Makah’s current action to enforce this “public right . . . becomes one that potentially benefits all who are affected by the agency’s action.” *Id.*; *see also Nat’l Licorice Co. v. Nat’l Labor Relations Bd.*, 309 U.S. 350 (1940) (declaring “[i]n a proceeding . . . narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights”). It does not matter “whether the public interest at issue is considered under [the public rights] exception or in conjunction with the enumerated factors under CR 19(b).” *AUTO*, 175 Wn.2d at 234 n.4 (“Any meaningful analysis of the CR 19(b) factors necessarily includes consideration of the consequences to the public of denying a judicial forum to review the constitutionality of governmental conduct.”).

dissimilar, and the concerns regarding prejudice to absent tribes in *Skokomish* are inapposite to this action.

Because no ruling on the dispute between Makah and the QTA tribes over treaty hunting rights is necessary, the Court's judgment would inherently be shaped in a way that avoided prejudice to the absent tribes. *See* CR 19(b)(2). The QTA tribes' argument that "[a] judgment in Makah's favor will therefore necessarily and unavoidably impact the Amici Tribes' rights," Amicus Br. at 16, depends on their mischaracterization of Makah's claims and request for relief and is simply untrue when the actual challenge brought by Makah is fairly appraised. To the extent the Court may need to address the treaty rights issue in resolving Makah's challenge to the Exchange, it could make clear that it is not making any findings or determinations regarding the scope and nature of any treaty rights and is only discussing them to establish context for the dispute regarding the Exchange (and resolving the arguments raised by the QTA tribes).

Judgment in this case, which will be limited to the state law procedural challenges that Makah is pursuing on appeal, will be adequate. *See* CR 19(b)(3). While the absent tribes would not be bound, they have expressed no position on the "other positions contested by [the parties]," *i.e.*, the issues actually in dispute in this case. There is no reasonable basis to anticipate future litigation based on a judgment limited to the claims and requests for relief actually being contested.

Finally, the Makah Tribe will not have an adequate remedy if the case is dismissed for nonjoinder. *See* CR 19(b)(4). This factor is often not dispositive when sovereign immunity prevents joinder of absent tribes. However, here it supports rejection of dismissal because the other CR 19(b) factors also favor Makah. A clear and established mechanism exists for challenging agency actions like the Exchange when compliance with SEPA and other procedural requirements is disputed. Makah is hewing to that mechanism in the present case, and would not have any other judicial forum in which to address its grievances about the Exchange if the case is dismissed under CR 19. Under these circumstances, the public interest in judicial review of agency action should be weighed heavily when considering the CR 19(b) factors. *See AUTO*, 175 Wn.2d at 234 n.4.³

In sum, the Makah Tribe seeks to vindicate public rights by ensuring DNR and the Board comply with applicable procedures of state law; it does not seek to adjudicate – whether directly or indirectly – treaty hunting rights on the northwest corner of the Olympic Peninsula. The Court can provide adequate relief as requested by Makah and avoid any prejudice to the absent tribes because this case is exactly what it appears to be on its face – a

³ A ruling dismissing the case under CR 19 would have significant ramifications for future tribal litigation under SEPA or other state procedural laws. Tribal interests are often closely linked to treaty-reserved fishing, hunting, and gathering rights, which apply broadly across western Washington. If claims under state procedural laws that may implicate the treaty rights of a non-plaintiff tribe are subject to dismissal under CR 19, it could severely restrict the ability of tribes in western Washington to vindicate public rights. Such an outcome would effectively prejudice at least 20 tribes and their members relative to other members of the public, which is clearly not the intent of the Civil Rules.

procedural challenge to state action under state law. Accordingly, the factors under CR 19 and the public interest warrant rejection of the QTA tribes' request to dismiss the action.

C. The UDJA Does Not Require Joinder of the QTA Tribes.

For largely the same reasons that CR 19 does not require the Court to dismiss the case for failure to join the QTA tribes, neither does the Uniform Declaratory Judgment Act ("UDJA"). "When declaratory relief is sought," the UDJA requires joinder of "all persons . . . who have or claim any interest which would be affected by the declaration" and avoidance of "prejudice [to] the rights of persons not parties to the proceeding." RCW 7.24.110.

As discussed above, the QTA tribes do not have an interest that would be affected by Makah's action to enforce SEPA procedures regarding the Exchange. The outcome of the case, if allowed to proceed, will be a declaration that the agencies' approval of the Exchange was either lawful or unlawful. Such a declaration – particularly with the Court's awareness of and sensitivity toward the treaty issue – will not be tantamount to an adjudication of rights held by Makah or the QTA tribes. Thus, the QTA tribes' reliance on *N. Quinault Props., LLC v. State*, 197 Wn. App. 1056, No. 76017-3-I, 2017 WL 401397, at *1 (2017) (unpublished), *see* Amicus Br. at 19-20, is unavailing because that case involved competing claims to Lake Quinault without the joinder of the Quinault Indian Nation. Here, in contrast, the "heart of the case" is Makah's procedural challenge to agency action. *Id.* at *2. The

QTA tribes are not necessary to the resolution of that claim for declaratory relief and cannot demonstrate that any rights they hold will be prejudiced by such a judgment. Accordingly, the UDJA does not require dismissal.

IV. CONCLUSION

For the foregoing reasons, the Court should hold that CR 19 and the UDJA do not require dismissal of the Tribe's procedural challenge to the Exchange.

Respectfully submitted this 30th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2020, I served the foregoing Response of the Makah Tribe to the Amicus Curiae Brief of the Hoh Tribe, Quileute Tribe, and Quinault Indian Nation to the Commissioner of Public Lands Hilary Franz, the Washington State Department of Natural Resources and the Washington State Board of Natural Resources (collectively, Defendants/Appellees), and the Hoh Tribe, the Quileute Tribe, and the Quinault Indian Nation (collectively, Amici) via email at the addresses below.

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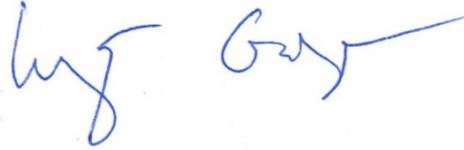
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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

Dated this 30th day of September, 2020 at Vashon, WA.

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September 30, 2020 - 12:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54945-0
Appellate Court Case Title: Makah Indian Tribe, Appellant v. Commissioner of Public Lands Hilary Franz, et al., Respondents
Superior Court Case Number: 20-2-01547-1

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